No. 80-1332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MORTON BERKOWITZ, MICHAEL KAHAN, PHILIPPA STRUM, HERBERT WEISS, ELLEN FREY-WOUTERS, ROBERT ENGLER and THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Petitioners,

v.

MICHAEL I. SELZER,

Respondent.

RESPONDENT'S ACQUIESCENCE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 6, 1981

QUESTION PRESENTED

Whether a city college professor's one time communication of information to the Central Intelligence Agency was Constitutionally protected conduct, such that his colleagues, acting under color of state law, were not entitled to punish him therefor by depriving him of promotion and tenure.

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STATEMENT OF THE CASE[1]

In late 1975, Professor Michael I. Selzer requested the Central Intelligence Agency ("CIA") to furnish him with research materials pertinent to his academic pursuits. Dr. Selzer was then an untenured Assistant Professor in the Political Science Department at Brooklyn College, a branch of the City University of New York. Selzer's candidacy for promotion to Associate Professor and his candidacy for tenure were to be considered in the 1976-77 academic year.

The CIA rejected Selzer's request for data. However, when a New York City field representative of the CIA learned that Selzer was planning a research trip to Western

1. A more complete statement of the facts of this case is set forth in respondent's own petition for certiorari, No. 80-1335, filed on February 5, 1981.

Europe in the summer of 1976, he asked Selzer to consider reporting back to the CIA on any information of a military, scientific, technical, economic or political nature which Selzer might come by. (Tr. 625)

When Professor Selzer returned from his trip he decided to comply with the CIA's request. He did not think he had any significant information to report, and certainly nothing that would warrant a face-to-face meeting. Nevertheless, he telephoned the CIA's New York office. The substance of the telephone conversation was so trivial that the CIA agent discarded his notes, and neither he nor Selzer pursued the matters discussed any further. The entire conversation took less than 15 minutes.

When word of Selzer's contact with the CIA reached the individual petitioners, who were Selzer's colleagues in the Brooklyn College Political Science Department, they did not treat the incident as trivial. Almost immediately they launched a campaign to oust Selzer from the faculty because of what he had done.

First, they sought the commencement of disciplinary proceedings looking toward Selzer's dismissal. Failing in that effort, they then sabotaged Selzer's candidacies for tenure and promotion by changing their earlier endorsements of Selzer's credentials to criticism. The latter tactic proved successful, and Professor Selzer's employment at Brooklyn College was terminated.[2]

Professor Selzer brought suit under 42 U.S.C. § 1983. After eight weeks of trial (and three and a half days of deliberation) the jury found six of the twelve individual defendants liable. In response to special interrogatories, the jury found:

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2. Under the applicable regulations, denial of tenure to a faculty member in Professor Selzer's position, *i.e.*, who had received five consecutive one-year appointments to the rank of Assistant Professor, automatically terminated his employment at the end of the fifth year.

—that Professor Selzer's association with the CIA was a substantial factor in the decision to deny his applications for tenure and promotion;

—that Professor Selzer would have been granted tenure and promotion if his association with the CIA had not been considered;

—that the conduct of each of the twelve individual defendants had caused that result; and

—that these six individual petitioners (though not the other six defendants) had acted in bad faith.

After entry of judgment against the individual petitioners, the Board of Higher Education of the City of New York was substituted as the judgment debtor.

DECISION OF THE SECOND CIRCUIT

On appeal, the Second Circuit Court of Appeals divided two to one. The majority acknowledged the jury's findings as to why Selzer had been denied tenure but ignored the jury's clear findings as to who had caused that injury and which of the defendants had acted in bad faith. The majority ruled that the jury should have been interrogated even further[3] and reversed and remanded for a new trial. (As to all of which we respectfully refer the Court to respondent's own petition for certiorari, No. 80-1335.) Judge Kaufman concurred in the reversal, but he voted to dismiss the complaint on the ground that Selzer's conduct was not protected by the Constitution.

3. The majority held that the jury should have been interrogated separately as to each defendant as to whether he or she would have voted differently on Selzer's candidacies for tenure and promotion in the absence of any consideration of the CIA matter.

REASONS FOR RESPONDENT'S ACQUIESCENCE TO THE PETITION

The instant petition raises the important and unresolved federal question of the extent to which the Constitution protects a citizen's right to impart information to the Central Intelligence Agency. In particular, it raises the issue of whether a state (or persons acting under color of state law) may punish a citizen for voluntarily cooperating with a federally mandated program for the collection of foreign intelligence information.

The courts below assumed that Selzer's association with the CIA was protected by the Constitution, but they did not articulate the rationale for their assumption. Respondent submits that the lower courts' assumption was correct. Nevertheless, respondent acquiesces in the petition for certiorari so that this important issue may be resolved with the authority which only this Court can supply. Respondent further notes that the issue raised by this petition will dispose of the entire case if it is resolved in petitioners' favor.[4]

Respondent's acquiescence in the petition does not, of course, imply that he agrees with petitioners on the merits. The right of citizens voluntarily to provide information to their government is a brick in the foundation of the democratic system and should be regarded as an inherent right protected by the Constitution. Petitioners' argument that Selzer's association with the CIA was not a protected form of association is anomalous because it would permit per-

4. The record on this issue was developed during a lengthy trial and will not likely be further developed on remand. Since the precise issue now tendered may dispose of this case, it should be decided now, before the parties and the courts below are required to expend substantial amounts of time and effort on a lengthy retrial. *See, Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 392 (1973) (Burger, C. J., dissenting).

sons acting under color of state law to punish others for voluntarily cooperating with the lawful activities of a Federal government agency.

Petitioners also ignore the Federal government's clear interest in receiving foreign intelligence information pertinent to its obligation to provide for a secure national defense.[5] Members of the academic community have proven to be a valuable source of such information. *See,* S. Rep. No. 94-755, 94th Cong., 2d Sess. 189 (1976), in which a Select Senate Committee (the "Church Committee") expressly recognized the propriety of the CIA's program of debriefing academics and the benefit to the Federal government from such contacts. The result petitioners seek would frustrate that program.

Petitioners have proposed a balancing test which fails to take the Federal interest into account. Even if a balancing test were applicable, in addition to the parties' interests, the Federal government's interests would be an integral part of such a test. A balancing of all the necessary interests would, we respectfully submit, result in the conclusion that respondent's communication with the CIA was protected.

Finally, respondent notes that the important issues raised by his own petition, No. 80-1335, rest upon the premise that his conduct was Constitutionally protected. The issues in respondent's petition may also permit the Court to resolve the entire case if the Court holds that Selzer's conduct was

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5. The Federal government's interest is set forth in National Security Council Intelligence Directive No. 2 (Feb. 17, 1972) (published on microfiche in Declassified Documents Reference System as Item No. (76) 253D (Carrollton Press 1976)), which was promulgated pursuant to 50 U.S.C. § 403(d)(4). That directive states, in part:

> 7. The Central Intelligence Agency, as a service of common concern, shall be responsible for the selective exploitation within the United States of non-governmental organizations and individuals as sources of foreign intelligence information. . . .

so protected. Accordingly, respondent urges the Court to grant certiorari to consider the issues raised by both petitions.

CONCLUSION

For the reasons stated above, respondent acquiesces in the instant petition for certiorari.

Respectfully submitted,

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